



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

April 7, 2022

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Garland:

Re: OSC File Nos. DI-22-000356, DI-22-000357, and DI-22-000358
Referral for Investigation – 5 U.S.C. § 1213(c)

Dear Attorney General Garland:

I am referring to you for investigation a whistleblower disclosure that employees at the U.S. Department of Justice (DOJ), Bureau of Prisons, Federal Corrections Institution Dublin, Dublin, California, (FCI Dublin), engaged in conduct that may constitute a violation of law, rule, or regulation, and a substantial and specific danger to public health. A report of your investigation of these allegations and any related matters is due to the Office of Special Counsel (OSC) by June 6, 2022.

The whistleblowers, [REDACTED] at FCI Dublin, and [REDACTED] FCI Dublin, consented to the release of their names. The whistleblowers disclosed that asbestos containing material (ACM) located throughout FCI Dublin has been disturbed, thereby, contaminating certain areas with asbestos dust and debris. The whistleblowers also disclosed that various areas in FCI Dublin have been contaminated with mold. The whistleblowers have brought the issues to management's attention, but they remain unresolved. The allegations to be investigated include:

- Daily floor buffing throughout FCI Dublin has disturbed the asbestos contained in damaged vinyl floor tiling in various areas and buildings in violation of Occupational Safety and Health Administration (OSHA) regulations;¹
- FCI Dublin has not implemented applicable OSHA safety measures² when daily floor buffing has disturbed the asbestos contained in damaged vinyl floor tiling;

¹ In pertinent part, OSHA's general asbestos standard states that dry buffing asbestos-containing floor material may occur only on flooring that has a sufficient finish so that the pad cannot contact the asbestos, and visibly deteriorated ACM shall not be dusted, swept dry, or vacuumed without using a HEPA filter. *See* 29 CFR § 1910.1001(k)(7)-(8).

² OSHA requires cleaning asbestos spills and sudden releases as soon as possible and using HEPA-filtered vacuuming equipment to vacuum asbestos waste, debris, and dust. 29 CFR § 1910.1001(k) *et seq.* Also, employers shall medically surveil all employees exposed to airborne asbestos at or above the time weighted average and/or excursion limits. *See* 29 CFR § 1910.1001(l) *et seq.*

- A shower renovation/expansion project in Housing Unit A has disturbed the asbestos in ACM and applicable OSHA safety measures³ have not been followed;
- FCI Dublin has not sufficiently cleaned or remediated mold located in various buildings throughout FCI Dublin;
- FCI Dublin has not sufficiently repaired a leak in the roof of the Education Building to prevent future mold growth; and
- Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

The whistleblowers stated that a 1998 asbestos survey and, subsequently, a 2020 inspection concluded that ACM, such as vinyl floor tiling and associated black mastic, is located throughout FCI Dublin including Housing Units A/B, C/D, E/F, the Old Special Housing Unit, and the Food Service, Medical Service, Administration/Business, VT Business, Visiting, and Education Buildings. The whistleblowers asserted that numerous floor tiles in these locations are cracked and warped—exposing the asbestos contained therein. The whistleblowers asserted that inmates mechanically buff the floors in these locations daily, including the damaged tiles. The buffing creates a visible cloud of asbestos dust and debris that is not managed or cleaned as prescribed by OSHA. The whistleblowers further asserted that a shower renovation/expansion project currently underway in Housing Unit A is either disturbing or removing ACM such as floor tiles and mastic. The shower area is not in use, and FCI Dublin facilities employees performing the work wear face coverings. However, the whistleblowers asserted that inmate common areas are near the work area and the facilities employees performing the work have not implemented engineering controls or work practices to minimize others' exposure to asbestos waste, dust, or debris.

Additionally, the whistleblowers alleged that mold is present and can be seen in several FCI Dublin buildings and areas including the Education and Drug Treatment Buildings, the Old Special Housing Unit, Food Service, the main lobby, and an office adjacent thereto. The whistleblowers alleged that, at management's direction, untrained FCI Dublin facilities employees attempted to clean areas where mold had been seen. But the whistleblowers alleged these areas were only superficially cleaned instead of fully remediated because the mold has repeatedly returned. The whistleblowers also alleged that the roof in the Education Building repeatedly leaks, which contributes to the problem there, explaining that FCI Dublin facilities employees have not fully repaired the roof given that the roof had leaked in October, November, and December of 2021.

Pursuant to my authority under 5 U.S.C. § 1213(c), I have concluded that there is a substantial likelihood that the information provided to OSC discloses a violation of law, rule, or regulation, and a substantial and specific danger to public health. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. If, in the course of your investigation, you discover additional violations, please include your findings on these additional matters in the report to OSC. As previously noted, your agency must conduct an investigation of these matters and produce a report, which must be reviewed and signed by you. Per statutory requirements, I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower's comments and any comments

³ OSHA requires construction, renovation, repair, or maintenance work that will likely disturb ACM to be conducted using engineering controls and work practices that minimize asbestos exposure. 29 C.F.R. § 1926.1101 *et seq.*

The Honorable Merrick B. Garland

April 7, 2022

Page 3 of 4

or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can be accessed at <https://osc.gov/Services/Pages/DU-Resources.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. § 1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 or cmcmullen@osc.gov for assistance. I am also available for any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry J. Kerner", with a stylized flourish at the end.

Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Michael E. Horowitz, DOJ Inspector General

APPENDIX
AGENCY REPORTS UNDER 5 U.S.C. §
1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report lower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1)